
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 22225

WM B LUCK, CLERK

JOHN J. McMULLEN ASSOCIATES, INC., *Appellant*,

v.

STATE BOARD OF HIGHER EDUCATION, ET AL., *Appellees*.

Appeal from the United States District Court for the
District of Oregon

HONORABLE WILLIAM T. BEEKS, District Judge

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

PLEADINGS AND JURISDICTION

This is an appeal by plaintiff-appellant, John J. McMullen Associates, Inc. (hereinafter referred to as Plaintiff) from final judgment of the U. S. District Court for the District of Oregon in favor of defendants-appellees, State Board of Higher Education (of Oregon), et al (hereinafter Defendants), dismissing the action.

This suit was commenced May 27, 1965, and subsequently an Amended Complaint was filed charging defendants with infringement of four U.S. patents, unfair competition and infringement of two U. S. trademark registrations, and

violation of constitutional rights. District Court jurisdiction was predicated on 28 U.S.C. § 1338(a).

By responsive motion and answer, defendants raised the defense of 28 U.S.C. § 1498, contending that because of dealings between one of the defendants (State Board of Higher Education) and the United States Government, plaintiff's sole remedy is against the United States in the Court of Claims, and plaintiff is therefore precluded from bringing this suit in the district court. The lower court segregated the defense under § 1498 for trial before the other issues. The agreed facts and issues pertaining to the segregated defense are set forth in a detailed Pretrial Order (CT 94).

The segregated issue was tried before the lower court on January 4, 1967. The Court sustained the defense under § 1498 by opinion dated May 17, 1967 (CT 181), and this opinion was adopted as the Court's findings and conclusions (CT 191). Based thereon, a judgment dismissing the action was entered May 29, 1967 (CT 192).

Notice of appeal was filed June 26, 1967 (CT 193). Jurisdiction of this Court upon the appeal is based upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE

The facts are simple and not in dispute. The issue is primarily one of law—the correct interpretation of § 1498 as applied to the undisputed facts.

In early 1963, Oregon State University, controlled by defendant State Board of Higher Education, acquired a surplus vessel, "F/S 210" (subsequently named the YAQUINA) (PT Order, Agreed Fact 17, CT 101). Specifications for conversion of the vessel for oceanographic research purposes were completed by a private naval architectural firm in November 1963; the specifications called for "passive anti-rolling tanks" but did not specify the type (PT Order, Agreed Fact 22, CT 102). On December

24, 1963, in response to a direct inquiry from plaintiff concerning applicability of § 1498, the Navy Department in the person of Admiral J. A. Brown advised that installation of a stabilization system as covered by plaintiff's patents did not fall "under the Government exemption" (PT Order, Agreed Fact 23, CT 102). The Government did not specify or require that an anti-roll stabilization system be installed in the subject vessel (PT Order, Agreed Fact 37, CT 103).

After competitive bidding, Oregon State University entered into an agreement, dated May 4, 1964, (Ex. 1184) with defendant Albina Engine & Machine Works, Inc., pursuant to which Albina was to convert the vessel pursuant to the architectural specifications (PT Order, Agreed Fact 28, CT 102). During the summer of 1964, defendant Albina converted the F/S 210 into the research vessel YAQUINA for Oregon State University pursuant to the contract (PT Agreed Fact 32, CT 103). During the conversion, defendant Albina manufactured and installed a ship stabilizing system which, for the purpose of the segregated issue tried by the lower court, must be presumed to infringe valid patents of the plaintiff (Op., CT 182). The YAQUINA was put into operation by Oregon State University on October 10, 1964, which operation has continued until the present (PT Order Agreed Facts 33 and 34, CT 103).

To finance the conversion, Oregon State University obtained funds by grant from the National Science Foundation. The money was given pursuant to two grant letters, the first for \$600,000.00 (Ex. 1143), dated June 7, 1963, and the second for \$170,000.00 (Ex. 1144), dated April 10, 1964. Similarly, the operation (use) of the YAQUINA has been financed to the extent of 50 per cent by grants from the National Science Foundation. (RT 135). Of the balance, the Navy Department pays 40 per cent and the Atomic Energy Commission pays 10 per cent pursuant to contracts with these agencies for specific research task orders. (RT 135-36).

Defendants urged to the lower court that the manufacture by defendant Albina and the use by Oregon State University of the stabilization equipment installed in the YAQUINA was for the United States Government within the meaning of 28 U.S.C. § 1498, and that therefore plaintiff could not maintain this suit for patent infringement in the district court.¹

The lower court accepted defendants' position and dismissed not only the causes of action predicated on infringement of plaintiff's four patents, but also those causes of action predicated on unfair competition and infringement of trademark registrations and violation of constitutional rights. The lower court entered a final judgment dismissing the entire action.

SPECIFICATION OF ERRORS

1. The District Court erred in dismissing the Amended Complaint, specifically, the Fifth and Sixth Causes of Action relating to unfair competition and infringement of trademark registrations and for violation of constitutional rights.

2. The District Court incorrectly concluded that the manufacture of the YAQUINA stabilizing equipment by defendant Albina and the use of the YAQUINA stabilizing equipment by Oregon State University, controlled by defendant State Board of Higher Education, were *for* the United States Government within the meaning of 28 U.S.C. § 1498.

¹ The relevant portions of 28 U.S.C. § 1498 provide:

(a) Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

For the purposes of this section, the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

SUMMARY OF ARGUMENT

The only matter heard by the lower court was the alleged defense under 28 U.S.C. § 1498.

Regardless of whether or not § 1498 precludes plaintiff's suit in the District Court for causes of action predicated on patent infringement, clearly this statute does not apply to those causes of action alleging unfair competition and trademark infringement, and violation of constitutional rights. Accordingly, this case cannot be dismissed at least as to the Fifth and Sixth Causes of Action asserted in the Amended Complaint.

With respect to the causes of action based on patent infringement, the manufacture and use by defendants of the stabilizing equipment in the YAQUINA was not "by or for the United States" within the meaning of 28 U.S.C. § 1498(a). Under the patent laws, the basic right of patent owners is the exclusive right to their inventions, 35 U.S.C. § 154. Since § 1498 is a statute limiting the jurisdiction of the district courts in enforcing the patent owners' basic rights, the statute should be construed narrowly rather than broadly.

The legislative history of § 1498 and its predecessor statutes shows clearly that the intent of Congress—and the purpose of the statute—was to prevent interference by patent owners with the procurement of materials and services by the United States Government. Therefore, the statute should be interpreted to apply only to procurement of goods and services for the Government and should not extend to activities which are being given only the financial support of the Government.

Use or manufacture of an invention financed with Government funds obtained under a National Science Foundation grant is not "for the Government" within the meaning of § 1498 because, as is clear from National Science Foundation's statements and its statutory history, such funds are

granted for support purposes only, intended to be without Governmental control or restriction, and are unrelated to procurement. Mere financial support by the Government was never intended as the test to deprive patent owners of their exclusive rights to their inventions by permitting infringers to hide behind § 1498 when there is no Government procurement.

For § 1498 to apply, the use or manufacture must be “*for the Government.*” Even though in these circumstances the Government has authorized or consented to the use or manufacture, such authorization or consent does not *a fortiori* make the use or manufacture of the invention “*for the Government*” when the procurement of goods or services is not *for the United States Government* but for Oregon State University. The grant funds advanced to Oregon State University are a gift or subsidization and lose their identity when received by Oregon State University and comingled with its general funds. Section 1498 does not exempt infringing activity by a grantee.

ARGUMENT

I

THE FIFTH AND SIXTH CAUSES OF ACTION CANNOT BE DISMISSED ON BASIS OF § 1498

The first four causes of action of the Amended Complaint relate to infringement by defendants of four patents, Nos. 3,054,373; 3,083,672; 3,094,094 and 3,109,403. The Fifth Cause of Action alleges violation by defendants of plaintiff's constitutional rights, particularly rights secured under the Fifth and Fourteenth Amendments to the Constitution of the United States of America “by depriving plaintiff of its property without just compensation and without due process of law”. The Sixth Cause of Action alleges unfair competition and infringement by defendants of U. S. Trademark Registrations Nos. 739,852 and 775,970, owned by plaintiff.

The Fifth and Sixth Causes of Action asserted in the Amended Complaint are separate and distinct from the first

four causes of action relating to patent infringement. Accordingly, they cannot be dismissed merely on the basis that the defendants may or may not have a valid defense to the patent infringement causes of action.

The segregated issue tried by the lower court was restricted solely to the applicability of § 1498. That statute is silent regarding violation of constitutional rights and/or trademark infringements. Therefore, no construction of § 1498 affords a basis for a dismissal of this Action including the Fifth and Sixth Causes of Action of the Amended Complaint.

The lower court, in its Opinion, Findings of Fact, and Conclusions of Law, made absolutely no reference to or specific disposition of plaintiff's Fifth and Sixth Causes of Action. In view of this record, the Judgment entered by the lower court must be reversed, at least for further proceedings in connection with these two causes of action.

II

THE MANUFACTURE AND USE OF THE EQUIPMENT WAS NOT "FOR THE GOVERNMENT" WITHIN THE PROPER INTERPRE- TATION OF § 1498

A. The Issue Involves Statutory Interpretation

At the outset, it is well to point out that no dispute exists as to the facts. The basic facts are all set forth in the Agreed Facts of the Pretrial Order (CT 94) and the exhibits, supplemented by undisputed testimony at the trial hearing. The only question is the applicability of § 1498 to the undisputed facts of the case. Thus, FRCP Rule 52(a)² and *McCallister v. U.S.*, 348 U.S. 19 (1954) clearly have no application to this appeal.

This is a case of first impression, insofar as it concerns the question whether mere financial support (grant funds)

² "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FRCP Rule 52(a).

from the National Science Foundation, with no Government procurement of goods and services involved, calls for the application of § 1498.³

B. Legislative History of the Patent Laws and § 1498.

The United States Patent Laws, enacted by Congress pursuant to Article I of the Constitution⁴ stem from the public policy to promote invention and private enterprise. This policy requires the full protection of patent rights against infringement.⁵

³ There are, however, some Comptroller General opinions bearing on the point, which are discussed *infra*, p. 26.

⁴ Article I, § 8: "The Congress shall have Power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . ."

⁵ *Report of the President's Commission on the Patent System*, Washington, D. C., 1966, pp. 2-3:

"Agreeing that the patent system has in the past performed well its Constitutional mandate 'to promote the progress of . . . useful arts,' the Commission asked itself: What is the basic worth of a patent system in the context of present day conditions? The members of the Commission unanimously agreed that a patent system today is capable of continuing to provide an incentive to research, development, and innovation. They have discovered no practical substitute for the unique service it renders.

"First, a patent system provides an incentive to invent by offering the possibility of reward to the inventor and to those who support him. This prospect encourages the expenditure of time and private risk capital in research and development efforts.

"Second, and complementary to the first, a patent system stimulates the investment of additional capital needed for the further development and marketing of the invention. In return, the patent owner is given the right, for a limited period, to exclude others from making, using, or selling the invented product or process.

"Third, by affording protection, a patent system encourages early public disclosure of technological information, some of which might otherwise be kept secret. Early disclosure reduces the likelihood of duplication of effort by others and provides a basis for further advances in the technology involved.

"Fourth, a patent system promotes the beneficial exchange of products, services, and technological information across national boundaries by providing protection for industrial property of foreign nationals."

The heart of what is granted the patent owner is "the right to exclude others from making, using or selling the invention throughout the United States". 35 U.S.C. § 154. This exclusive right is in strict conformance with the constitutional mandate appearing in Article I, Section 8, that the progress of science be promoted by securing to inventors the *exclusive right* to their discoveries for limited times. In furtherance of this statutory right and constitutional mandate, the Federal courts are empowered to grant injunctions to prevent violation of the rights secured by patent. 35 U.S.C. § 283.

The single exception to the exclusivity has been the Federal Government. Prior to the initial predecessor of 28 U.S.C. § 1498, the Supreme Court had enunciated that whenever the United States Government made use of a patented invention without license, it became a tortious infringer liable to the patent owner in the same manner as a private party. *United States v. Burns*, 79 U.S. 246 (1870); *James v. Campbell*, 104 U.S. 356 (1881); *United States v. Palmer*, 128 U.S. 262 (1888). However, the Government refused to be sued for patent infringement without its consent under its immunity as a sovereign. *Schillinger v. United States*, 155 U.S. 163 (1894); *Pitcher v. United States*, 1 Ct. Cl. 7 (1853). The Court recognized that, in effect, the patent owner was left with a right without a remedy and placed responsibility on Congress to correct the situation. See *Carr v. United States*, 98 U.S. 433, 437 (1878) cited with approval in *James v. Campbell, supra*.

The Congress finally enacted the Act of 1910.⁶ The House Committee on Patents in this Report stated that the failure

⁶ Act of June 25, 1910, c. 423, 35 Stat. 851, provides in pertinent part:

"That whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the Court of Claims . . ."

of the Government to provide any remedy to wronged patent owners constituted a taking of property without due process of law in violation of the Fifth Amendment to the Constitution.⁷ Accordingly, the Act of 1910 was intended to provide aggrieved patent owners with a remedy against the United States.

At the height of World War I, the Supreme Court handed down its decision in *Cramp & Sons Ship & E. Bldg. Co. v. International Curtis Marine Turbine Co.*, 246 U.S. 28 (1918). Curtis had sued Cramp to recover damages and profits accruing from infringement of certain of its patents, which infringement had occurred in the performance of a Government contract. The Court held that the provisions of the Act of 1910 did not extend to a Government contractor.

This decision prompted the Acting Secretary of the Navy, Franklin D. Roosevelt, to dispatch a letter to the Chairman of the Committee on Naval Affairs of the Senate requesting amendment of the Act of 1910 to make its provisions applicable to Government production by private contractors.⁸

In view of the wartime need, an amendment was tacked onto a Naval appropriation bill and vigorously supported in Congress.⁹

⁷ "The United States can not be sued except where it has consented thereto by statute, and unless this or some similar bill shall be passed the owners of patents will continue to be the only persons who are outside the protection of the fifth amendment to the Constitution . . ." H. Rept. No. 1288, 61st Cong., 2d Sess. (1910).

⁸ The letter is reproduced in the case of *Wood v. Atlantic Gulf & P. Co.*, 296 Fed. 718, 720, 721 (S.D. Ala. 1924).

⁹ Statement to the House by Mr. Padgett, 56 Cong. Rec. 7960-61 (1918) :

"This is an amendment of the patent law, and, generally speaking, it would not be appropriate on the naval appropriation bill. It makes only a slight change in the existing law, but the urgency and necessity of it was such that the Senate deemed it proper to place it on the bill. It is strongly recommended in a letter from the Assistant Secretary of the Navy, Mr. Roosevelt.

" . . . Now, the only change that is made [in the existing law] is to provide that the private contractor, who is doing the Government work un-

Congress enacted the amendment which has come to be known as the Act of 1918.¹⁰ The Act of 1918 enacted into law the language which now appears in paragraph one of the present § 1498:

“That whenever an invention described in and covered by a patent of the United States shall hereafter be used *or manufactured by or for* the United States without license of the owner thereof or lawful right to use *or manufacture* the same, such owner’s remedy shall be by suit *against the United States* in the Court of Claims *for the recovery of his reasonable and entire compensation for such use and manufacture*: Provided, however, That said Court of Claims shall not entertain a suit or award compensation under the provisions of this Act where the claim for compensation is based on the use *or manufacture by or for* the United States of any article heretofore owned, leased, used by, or in the possession of the United States” [Changes from Act of 1910 in italics]

The statutory history and the Act of 1918 were reviewed by the Supreme Court in the case of *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331 (1928). The Court concluded that by specifying recovery in the Court of Claims for the patent owner’s entire compensation for infringement in production for the Government, the Act effected an assumption of liability by the Government. As such, litigation against the actual infringer was precluded in connection with his production for the Government.

The effect of the Fourth Circuit decision in *Newport News Shipbuilding & Drydock Co. v. Isherwood*, 5 F. 2d 924

der contract with the Government shall be placed on the same basis and shall bring suit against the Government of the United States to recover certain compensation from the use of their patent, or such damage for the use of the patent, as they could recover if the Government of the United States was doing the work itself. Thereby it would prevent the injunctive process from the courts being used to prevent private manufacturers doing Government work. That is the whole change made in the law and the conditions are such as to require that it should be done.”

¹⁰ Act of July 1, 1918, c. 114, 40 Stat. 705.

(4th Cir. 1925), cert. denied 269 U.S. 592 (1925), wrought the next significant change in the statute. The parties had previously entered into a licensing agreement, the terms of which were in dispute. The shipbuilding company was under contract to the Navy to build for the Government eight oil tankers utilizing the Isherwood patents. The shipbuilding company contended that it was, by virtue of the Act of 1910, as amended, not required to pay royalties on these eight ships. In rejecting this argument, the Court held that there was no use of a patent without a license (the situation to which the amended Act of 1910 was directed), but, on the contrary, the vessels were built under a lawful licensing agreement authorizing the use of the patents (at 934).

While the decision in this case placed no undue hardship on the cost of Government procurement during peacetime conditions because the Government had to bear the ultimate cost of the royalties so paid by reimbursement of the contractor's costs, the advent of World War II caused reasonable royalty costs based on limited peacetime production immediately to become excessive when multiplied hundreds and thousands of times by a greatly expanded production for the war. As a consequence, in 1942, Congress enacted the Royalty Adjustment Act.

The portion of The Royalty Adjustment Act applicable to the statutory history of § 1498 was Sec. 6 (second half) which introduced the language now appearing as the second paragraph of the present statute:

“For the purpose of this Act, the manufacture, use, sale, or other disposition of an invention, whether patented or unpatented, by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government shall be construed as manufacture, use, sale, or other disposition for the United States; and for the purposes of the Act of June 25, 1910, as amended (40 Stat. 705; 35 U.S.C. 68), the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or

any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States." The Royalty Adjustment Act, 1942, Act of October 31, 1942, Sec. 6, c. 634, 56 Stat. 1013.

Accordingly, the second half of Sec. 6 and the Act of 1910, as amended, were construed together.

The purpose of the Royalty Adjustment Act was to reduce the liability of the Federal Government in connection with the utilization of patented inventions.¹¹ The incorporation into Sec. 6 of the "authorization or consent" of the Government acted to limit the Government's liability to only those cases where the manufacture or use was for the Government *and* where the Government had actually given its authorization or consent to such appropriation of the patented inventions.

¹¹ The Royalty Adjustment Act resulted from S. 2794. In its Report (S. Rept. 1640), the Senate Committee on Patents stated:

"By virtue of [the Act of 1910] the owner of a patent may sue the United States to recover reasonable compensation whenever his invention is used without his consent in connection with war procurement. Because of this law, it has been the policy of the procuring agencies of the Government to use unhesitatingly any patent deemed essential in the procurement program . . .

"In recent months it has become apparent that procurement costs of material in certain instances include exorbitant royalties under already existing patent licenses. The principal motive of the bill is to remedy such situations."

In the Report of the House Committee on Patents (H. Rept. 2602), the purposes of the Act are enumerated:

"1. To eliminate the payment of excessive royalties by the Government to the owners of inventions on articles manufactured under licenses to Government contractors or subcontractors;

* * * * *

"3. To place the owners of inventions utilized by the Government in the war effort on an equal footing and to permit the Government to exercise its rights to utilize such inventions through the medium of any desired source of supply, without having to pay more than a fair and just compensation to the owners of such inventions;"

After World War II, the Act of 1910, then a part of Title 35 of the United States Code (40 Stat. 705 (1918), 35 U.S.C. § 68 (1952)) was reworded and transferred to Title 28¹² and, subsequently, amended again to follow more closely the language employed in the 1918 amendment.¹³ However, none of these changes was material, and in 1951, Sec. 6 of the Royalty Adjustment Act, with its requirement for authorization or consent, was substantially incorporated into 28 U.S.C. § 1498.¹⁴

The purpose and significance of § 1498 to the Federal Government is stated clearly and concisely in the Opinion of the Comptroller General, 38 Comp. Gen. 276, 119 U.S.P.Q. 187 (1958). This opinion followed the Comptroller General's decision in *Herbert Cooper*, B-136916 (August 25, 1958) (unpublished) and was requested by the Secretary of the Air Force to clarify what he felt were "broader implications" of the *Herbert Cooper* opinion. The Comptroller replied:

"... It is suggested that the indiscriminate use of the right afforded to the Government under 28 U.S.C. 1498 would be inimical to and destructive of the public policy considerations underlying the patent law. It is our view, however, that section 1498 appears clearly to constitute a modification of the patent law *by limiting the rights of patentees insofar as procurement of supplies by the Government may be concerned*, and by vesting in the Government a right to the use of any patents granted by it upon payment of reasonable compensation for such use. We believe that the statute is not consistent with any duty on the part of a contracting agency of the Government to protect the interests of patentees or licensees *with respect to articles which it proposes*

¹² Act of June 25, 1948, ch. 646, 62 Stat. 941, 35 U.S.C. § 68, repealed by 62 Stat. 993 (1948).

¹³ Act of May 24, 1949, ch. 139 § 87, 63 Stat. 102 (1949).

¹⁴ Act of October 31, 1951, ch. 655, § 50(c), 65 Stat. 727. In the codification of Sec. 6 of the Royalty Adjustment Act, the words "sale, or other disposition" were omitted.

to purchase, since the statute itself defines and provides an exclusive remedy for enforcement of the patentee's rights as to the Government. Any other interpretation would appear to us to impose an impossible burden upon Government procurement officials to determine the applicability and validity of any patents affecting any articles desired.

“Where the procurement is to be made by formal advertising, it is our opinion, notwithstanding what was said in 13 Comp. Gen. 173, that there is no alternative to the securing of the maximum amount of competition from firms qualified and willing to undertake the production of the articles, subject, of course, to their willingness and ability to indemnify the Government against claims of patentees.” (at 119 U.S.P.Q. 188) [Emphasis added]

Clearly, the position stated on behalf of the Government is that § 1498 relates to Federal *procurement* of goods and services.

C. The Requirement for Authorization or Consent is Separate and Apart from the Requirement that the Use or Manufacture of the Invention be for the Government.

In its opinion, the lower court concluded that “both the manufacture and use of the stabilization tank [in the YAQUINA] were with the authorization and consent of the Government”. (CT 186). Although plaintiff does not take issue with this conclusion by the lower court for the purpose of this appeal, it is important to lay to rest one aspect of construction to be accorded § 1498.

It is not clear from the lower court's Opinion whether or not it considered the existence of the authorization and consent as *per se* “for the Government”, and thereby concluded that § 1498 applied.¹⁵ To so construe § 1498 would not only violate customary principles of statutory construction, but also is contrary to its statutory history and applicable case law.

¹⁵ This theory was postulated to the lower court by defendants-appellees.

The pertinent jurisdictional command of § 1498(a) appears in the first paragraph:

“Whenever an invention . . . covered by a patent . . . is used or manufactured . . . for the United States without license . . . , the owner’s remedy shall be by action against the United States in the Court of Claims”

The second paragraph of § 1498(a) further defines what “shall be construed as use or manufacture for the United States”:

“ . . . use or manufacture . . . by a contractor, a subcontractor, or any person, firm, or corporation *for the Government and with the authorization or consent of the Government*” [Emphasis added]

This language is plain and unambiguous. The use or manufacture must be for the Government, and *also* with authorization or consent.

To urge that *with authorization or consent of the Government* is synonymous with *for the Government* is to ignore the presence of this latter phrase in the second paragraph of the statute and the conjunctive “and” appearing between the two phrases. Accordingly, under the definition of the second paragraph, use or manufacture of an invention by a contractor, subcontractor, or any person, firm, or corporation is construed as use or manufacture for the United States *only* if the use or manufacture of the invention is *both* for the Government and with the authorization or consent of the Government.

Therefore, authorization or consent by the Federal Government aside, the manufacture or use required by the statute also to be *for the Government* has, in the factual circumstances of this case, not all been *for the Federal Government*. Hence, the jurisdictional exclusion of § 1498 does not apply.

This dual requirement of the second paragraph of § 1498(a) is consonant with the statutory history. The

authorization or consent language of § 1498 originated with the Royalty Adjustment Act which was enacted to reduce the liability of the Federal Government in connection with the utilization of patented inventions.¹⁶ The incorporation into the pertinent section (Sec. 6 of the Act) of the authorization or consent provision served to limit the Government's liability to only those cases where the manufacture or use was for the Government and where the Government had actually given its authorization or consent to such appropriation of the patented inventions.

The Senate Committee on Patents, in its Report (S.Rept. 1640) on the bill (S. 2794) which became the Royalty Adjustment Act, pointed out that the bill was originally introduced by the War Department, and after hearing, it was decided that it should be modified:

“ . . . to clarify the language of the bill as introduced to show definitely that modification of the act of June 25, 1910 as amended, is only intended so far as the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm or corporation *acting for the Government* with its authorization or consent, shall be construed as use or manufacture for the United States . . .” (at p. 5) [Emphasis added]

The effect of the Royalty Adjustment Act on the jurisdiction of the Court of Claims was considered by that Court in *Yassin v. United States*, 76 F. Supp. 509 (Ct. Cl. 1948). The case involved certain portable bridges used by Great Britain during World War II in Europe. The patent owner argued that the second half of Sec. 6 (Royalty Adjustment Act), which was the then existing predecessor to § 1498, extended the Court of Claims' jurisdiction to the manufacture, sale or delivery of patented inventions directly to Great Britain because it was done with the authorization and consent of the United States. However, the Court sus-

¹⁶ Report of the House Committee on Patents (H. Rept. 2602).

tained the Government's demurrer because the manufacture, sale or delivery was not also "for the Government" of the United States (76 F. Supp. at pp. 518-520).

To the same effect is the language of Judge Maris in *Drexler v. Koza*, 88 F. Supp. 298 (W.D. Pa. 1950) where the Court allowed damages in an accounting only with respect to sales to commercial customers as opposed to the Federal Government. The Court pointed out:

"... Section 6 of the Royalty Adjustment Act brought within the scope of what is now 28 U.S.C.A. § 1498 the manufacture and use of infringing devices by contractors, subcontractors or other persons *for the Government*, even though such devices were not actually used by the Government itself, but only if such manufacture or use was with the authorization or consent of the Government." (88 F. Supp. at p. 300) [Emphasis added]

Moreover, to adopt the defendants' interpretation would contemplate that § 1498 precludes injunction proceedings against private parties in connection with conduct wholly unrelated to the Federal Government, if such parties were in some way able to secure from the Government an authorization and consent document. Such power in the Federal Government in areas of clearly non-Government activity might be violative of the constitutional mandate for the patent system, "... securing for limited Time to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ." (Article I, Sec. 8).

D. The Manufacture and Use of the Stabilizing Tank in the YAQUINA Was Not for the Federal Government.¹⁷

It should be apparent from the foregoing that the basic question presented on this appeal involves the construction to be applied the expression "for the Government" as it appears in § 1498(a). In light of the statutory history of § 1498 and the interpretations of judicial and quasi-judicial tribunals, the present circumstances do not properly fall within the category of manufacture and use of a patented invention "for the Government".

In particular, the manufacture and use of the stabilizing equipment installed in the YAQUINA were not *for* the United States for the following reasons:

1. Under the agreed facts in the Pretrial Order, it was stipulated that "defendant Albina converted the FS 210 into the research vessel Yaquina for the State Board". (PT Order Agreed Fact 32, CT 103).

2. The Agreement (Ex. 1184) between Oregon State University, controlled by defendant State Board of Higher Education, and defendant Albina for conversion of the

¹⁷ For the purpose of this appeal, plaintiff does not distinguish between the manufacture of the YAQUINA stabilizing system by defendant Albina and the use of the stabilizing system by Oregon State University, controlled by defendant State Board of Higher Education, as separate acts of infringement. All of the conversion and 50 per cent of the use of the YAQUINA have been paid for with grant funds. Therefore, if the Court agrees with plaintiff-appellant's interpretation of § 1498 and the National Science Foundation Act as they relate to grant funds, distinction is not necessary since the District Court has jurisdiction over those activities of defendants which are not "for the Government." *Neff Instrument Corp. v. Cohn Electronics*, 269 F.2d 668, 672-673 (9th Cir. 1959) (Court reversed summary judgment dismissing Complaint under § 1498 defense since there was sufficient evidence to establish non-exempt infringements); *Northill Co. v. Danforth*, 51 F.Supp. 928 (N.D.Cal. 1942), aff'd 142 F.2d 51 (9th Cir. 1944) (jurisdiction retained to adjudicate infringement for only 0.59 per cent of total sales, it having been shown that 99.41 per cent of sales of accused device were to the Federal Government); *Drexler v. Koza*, 88 F.Supp 298 (W.D. Pa. 1950) (Court awarded damages only in connection with sales of accused device not to Federal Government).

YAQUINA expressly states: “. . . the Contractor . . . agrees . . . to construct and complete the work herein described . . . for the conversion of the research vessel ‘YAQUINA’ for Oregon State University, Corvallis, Oregon.” [Emphasis added]

3. Similarly, the advertisement for bids for conversion of the YAQUINA stated: “Sealed bids will be received by the Oregon State Board of Higher Education . . . for the conversion of the research vessel ‘YAQUINA’ for the Department of Oceanography of Oregon State University.” (Ex. 1225)

4. Defendant Albina was paid for the conversion work, including the infringing manufacture, by check from the Oregon State University as represented by defendant State Board of Higher Education (Caldwell Dep., Ex. 1104, p. 5). Indeed, defendant Albina looked only to Oregon State University for payment for the conversion. (Hussa Dep., Ex. 1113, pp. 4-5)

5. Defendant Albina had no knowledge or concern as to whether the United States Government was in any way interested in the conversion, or as to whether Oregon State University received any of the monies to pay for the conversion work from other sources, or as to whether it might be a Government subcontractor. (Hussa Dep., Ex. 1113, pp. 4-5, 7; Caldwell Dep., Ex. 1104, p. 6)

6. The vessel YAQUINA is *owned* by the State of Oregon and not by the United States Government. Dr. Burt testified by deposition:

“Q So title to the vessel [YAQUINA] resides in whom?

“A The hull, itself, the title remains in the State of Oregon, to the best of my knowledge.” (Burt Dep., Ex. 1005, p. 4)

Furthermore, it was stipulated at the trial that for all practical purposes title to the vessel is vested in Oregon State. (RT 16)

7. Records of the United States Customs at Portland, Oregon, further establish the State of Oregon as owner of the YAQUINA. The vessel's being owned by the State and engaged in research is not documented. However, in the letter from Oregon State University to the Bureau of Customs, U. S. Treasury Department, Washington, D. C., requesting admeasurement, it is stated that the vessel "is now the property of the State of Oregon". (Ex. 2006, CT 179)

Likewise, the letter dated August 21, 1964, from J. P. Tebeau, Assistant Deputy Commissioner of the Bureau of Customs, addressed to the Collector of Customs in Oregon State, states: "*YAQUINA, owned by the State of Oregon, will operate as a research ship and will not engage in trade.*" (Ex. 2007, CT 179)

8. The Certificate of Inspection of the YAQUINA, issued by the U. S. Coast Guard, designates the State of Oregon as *owner* and Oregon State University as *operator* of the vessel. (Ex. 2011, CT 179)

In the face of these facts, the lower court reached two conclusions which presumably formed the foundation for its decision that the manufacture and use of stabilizing equipment in the YAQUINA was "for the Government" (1) "oceanographic research, including 'basic' research of unknown practical application, has been recognized by the legislative and executive branches as vital to the interest of the U.S. Government", and (2) "the conversion and use of the YAQUINA, including the manufacture and use of the stabilization tank, were to equip it for such research, and therefore were 'for' the Government". (CT 186)

Plaintiff does not take issue with either of these conclusions, but they do not warrant the ultimate conclusion that the conversion and use of the stabilizing equipment in the YAQUINA gives defendants an absolute defense under § 1498. The conclusion that oceanographic research is vital to the interest of the United States is an obvious

sylogistic conclusion from (1) the major premise that the Federal Government never spends public funds unless there is a Congressional and Executive recognition that the purpose for which funds are being spent serves the vital interest of the Federal Government, the nation, and promotes the general welfare of citizens, and (2) the minor premise that the Government is financially supporting such research. Even though financial participation by the Government in basic research in oceanography is desirable, equally so are any number of important projects: elimination of poverty; encouragement of public works; strengthening of the educational systems; support of state highway systems; relief from disasters; etc. The list is too long to enumerate. But financial participation, *per se*, does not make the end product *for* the Government when it does not involve the procurement of goods and services necessary to carry out a Governmental function.

The position of the lower court is best illustrated in its conclusion:

“Where the Government finances the manufacture of a device and grants it to a private agency with the stipulation that it can only be used for specified purposes, and such use advances recognized vital interests of the U.S. Government, the conclusion is inescapable that such manufacture and use were ‘for’ the U.S. Government.” (CT 188)

The only “specified purpose” in the grant to which the lower court refers is that the vessel be used “primarily for the conduct of basic scientific research”. (Ex. 10) The grant does not require the YAQUINA to be used for the Government for Government research or for any Government purpose. Under the terms of the grant, the vessel can be used privately for profit so long as it is used for basic scientific research.

This quoted abstract statement of the lower court has no basis in the purpose for, or the legislative history of,

§ 1498. Can § 1498 realistically be construed to cover Federal financial assistance by way of grant or otherwise to each and every project or hardship to which the Federal Government contributes? Does the manufacture and use of a patented invention with such assistance automatically invoke § 1498 as "for the Government" and thereby preclude the patent owner from his basic injunctive rights under the Patent Laws? If so, there is very little commercial and non-commercial activity left in this country which is immune from § 1498 because of the extent to which Federal money today helps finance otherwise non-Federal business or activity.

But consider the opposite problem, will giving of grant or aid funds automatically subject the Government to liability in the Court of Claims when the recipient of the funds infringes a patent? Is the Federal Government going to assume responsibility for a grantee's conduct even though his activities do not contribute goods or services needed to carry out a Governmental function?

Furthermore, it would appear that the quoted conclusion of the lower court is somewhat at odds with two earlier decisions in the Ninth Circuit, *Syston-Donner Corp. v. Palomar Scientific Corp.*, 239 F.Supp. 148 (N.D.Cal. 1965), and *Consolidated Vacuum Corp. v. Machine Dynamics, Inc.*, 230 F.Supp. 70 (S.D.Cal. 1964).

The first case involved the manufacture and sale of certain accelerometers by the defendant which plaintiff alleged were an infringement of its patent. The defendant contended that all sales were for Government end use. After a trial on the segregated issue of § 1498, Judge Sweigert held, *inter alia*, that this statute did not preclude his jurisdiction over the infringing manufacture even though the subject equipment may eventually come into use by the United States, because such use was not required by the manufacture and sale. In the instant circumstances, there was no requirement in the conversion arrangements for

the YAQUINA that a stabilization system be put in the ship or that it be used for the Federal Government.

The second decision held that § 1498 did not preclude jurisdiction over a defendant which manufactured and sold testing equipment to Government contractors who, in turn, used the equipment to test devices sold to the Federal Government under contract.

The infringing manufacture and sale of the stabilization system in the YAQUINA is not affected by the fact that such equipment is subsequently used to stabilize a vessel on which some research is conducted for the Government.

Section 1498, as it stands today, is intended to relieve Government contractors from patent disputes in connection with Federal contracts. *Bereslavsky v. Esso Standard Oil Co.*, 175 F.2d 148, 149-150 (4th Cir. 1949). Congress never intended that § 1498 cover circumstances where Federal *support* funds help finance acts by third parties which create infringement controversies outside Government procurement.

E. National Science Foundation

The theory and purpose of the National Science Foundation Act is to stimulate American research in the basic sciences. The Foundation Act itself recognizes the grant as one means for initiating and supporting basic scientific research. 42 U.S.C. § 1862(a)(2). The character of a grant (as opposed to a contract) by the National Science Foundation is set out in a number of policy documents. For example, in the Memorandum to Members of the Senior Staff, Subject: Use of Contracts in the Conduct of NSF Programs and Activities, dated June 1, 1959, (Ex. 1139) the following appears:

"Criteria for the Use of Contracts as Contrasted to Grants.

"The principal guideline which should be employed in deciding whether, for a particular transaction, a

grant or contract should be employed is the following:

“If the purpose of the transaction is to give *support* to an activity which under our statute we are supposed to foster and encourage, then a grant is usually the most appropriate instrument; if on the other hand the purpose of the transaction is to obtain services or information which is *desired or required by the Foundation in order to enable it to carry out its responsibilities*, then a contract is the most appropriate instrument.” (p. 2) [Emphasis added]

Similarly, the 1966 Report of the House Committee on Science and Astronautics, *The National Science Foundation—A General Review of Its First 15 Years*, includes the following:

“Contracts have traditionally been used when the nature of the end product sought is known and requirements can be made the subject of negotiation between the Government and interested parties, normally through competitive bidding procedures with the contract being awarded to the lowest bidder. Contracts are widely utilized for sponsoring engineering development projects with private industry. In the case of scientific research, however, even where answers are sought to explicit scientific questions, the success and thus the cost of attaining it are uncertain, and applications are generally unknown

“Grants have been defined as ‘essentially unilateral actions by the Government under which payments are made in advance of the investigations concerned for the purpose of encouraging, supporting, and stimulating the general research work of public and private institutions and individuals, based on a decision of Congress that the support of the work of such institutions and individuals will be of benefit to the public.’ . . .” (House Doc. 317, 89th Cong., p. 44)

From this language, clearly a grant gives support to an activity, and is not used for procurement. If procurement is desired, a contract is the appropriate instrument. Accordingly, the expenditure of grant funds by a grantee is not

related to any procurement by the Federal Government, but rather to carry on some activity which the Government fosters, encourages, and supports. Therefore, the use or manufacture of a patented invention with such funds does not fall within the scope of the procurement protection of § 1498.

This interpretation is consonant with the Comptroller General decisions to the effect that the use of grant funds by the grantee is not subject to the restrictions of Federal statutes. (See 28 Comp.Gen. 54 (1948); 25 Comp.Gen. 868 (1946); B-131324 (June 12, 1957); B-153348 (April 22, 1964).)

Another important factor to be considered is the degree of control exercised by the Federal Government. In procurement by the United States, such as that protected by § 1498, the contract is the classical device because of the control through legal safeguards which is available to the Government. Certainly, the restrictions associated with the grants to Oregon State University in this case are no more than to insure use of grant funds for the intended basic research. Again, it is significant that the grants in no way restrict for whom the research must be done. There is no requirement that the research be conducted for the U.S. Government.

The question of Federal control was intensively argued prior to enactment of the National Science Foundation Act in view of the fear that Federal support for research and graduate education would inadvertently bring Federal control that could stifle the creative forces which thrive best in academic freedom. House Document No. 317, Rep.Comm. on Science and Astronautics, *The National Science Foundation—A General Review of Its First 15 Years*, January 24, 1966. This Congressional intent to foster and encourage basic research without stifling the creative forces by Federal control is inherent in the grant authority permitted

the National Science Foundation. The grantee, through the principal investigator, is accorded wide latitude in pursuing interesting and important lines of inquiry without fear of interference by the Foundation which might inhibit intellectual curiosity and research initiative. National Science Foundation, *Grants for Scientific Research*, June 1963, as amended December 1963 (Ex. 1136), pp. 22-23.

Finally, the function of the National Science Foundation is *not* to *perform* research, but to encourage, promote and support research by other institutions. It was created "to promote the progress of science; to advance the national health, prosperity and welfare; and to secure the national defense." (Preamble to National Science Foundation Act) As pointed out in the Rep. Committee on Science and Astronautics, *The National Science Foundation*, 1966 (House Doc. No. 318), p. xiv, the legislative charter of the Foundation does not generally permit in-house research or technological activity. Therefore, its only job is to promote and support. The research work itself is not its work.

Accordingly, whether a grant from the National Science Foundation is an outright donation of funds or one with a few simple restrictions is immaterial to the issue. *The expenditure of the grant funds by the grantee is not in connection with any procurement by the Government. Hence, it is outside the scope of § 1498 which is intended to protect such procurement.*

This interpretation of § 1498 in connection with the instant facts was stated at an early date by Rear Admiral J. A. Brown, Assistant Chief of the Navy Department Bureau of Ships when directly queried by plaintiff. He wrote in a letter (Ex. 1056) :

"Since the ship [YAQUINA] will belong to the State of Oregon, if a flume stabilization system is installed (and something like it is contemplated), it cannot be done under the U.S. Government exemption."

To ignore the intent and purpose of § 1498 and the applicable provisions of the National Science Foundation Act relevant to grant policy in deciding the question posed in this case necessarily results in abstraction. When analyzing the provisions of these statutes together, the conclusion is inescapable that funding by the Federal Government in accordance with its grant authority under the National Science Foundation Act is unrelated to any procurement of goods and services by the Government, and, therefore, the activity of the grantee supported by the grant funds is *not* for the Government under § 1498.

CONCLUSION

The only matter before this Court is the proper interpretation to be accorded § 1498, first, as to whether it can be a basis to dismiss plaintiff's Fifth and Sixth Causes of Action and, second, whether defendants' manufacture and use of the stabilizing equipment in the YAQUINA was "for the Government" as that phrase appears in the statute.

The lower court failed to give any consideration to plaintiffs' Fifth and Sixth Causes of Action. Section 1498, insofar as pertinent to this litigation, affords a defense only to patent infringement causes of action. Accordingly, plaintiff's Fifth and Sixth Causes of Action, relating to violation of constitutional rights and trademark infringement, cannot be dismissed, and the Judgment entered below must be reversed for further proceedings in connection with these two causes of action.

The use of funds obtained from the Government by way of grant from the National Science Foundation for the manufacture and use of a patented invention, and not in connection with procurement of goods and services by the Government, is not "for the Government" within the meaning of § 1498. The lower court, mistaking the presence of the Government as financier for the manufacture and use of the YAQUINA stabilizing system, failed to perceive

the real intent and purpose of § 1498 and the National Science Foundation Act. Accordingly, the Judgment of the lower court dismissing the action should be reversed with directions to proceed with the remaining issues in the case.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

APPENDIX

EXHIBITS OF RECORD			
	Identified ^a	Offered (Page of RT)	Received (Page of RT)
Plaintiff's Exhibits:			
1001-1187	CT 132-141		66
1188-1240	CT 83-89		66
Defendants' Exhibits:			
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11-37S	CT 143-147		66
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91B	CT 150	34	34

^a All exhibits were either identified in the Pretrial Order (CT 94), supplemental document lists, or by a Stipulation. The appropriate references to the Court Transcript are set forth.

	Identified ^a	Offered (Page of RT)	Received (Page of RT)
Defendants' Exhibits (continued):			
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Court Exhibits:

2001-2015	CT 178-180	(By Stipulation)
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